

GOVERNMENT PROPOSED JURY INST. NO. 181

Preparing False Return -- Offense Charged

The indictment sets forth _____ counts or charges.

Count I charges that on or about _____, in the District of _____, the defendant, _____, did willfully aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service of a false and fraudulent income tax return **1** [*of one [Taxpayer's Name]*] **2** for the calendar year ____; in which said return **1** it was represented that the said taxpayer **2** was entitled under the provisions of the internal revenue laws [*to claim deductions 3 in the total sum of \$ ____* ;] whereas, as the defendant then and there well knew and believed, the [*total deductions*] **3** which the said taxpayer **2** was lawfully entitled to claim for said calendar year were [*in the total sum of not more than \$____.*]

Count II charges * * *.

All in violation of Title 26, United States Code, Section 7206(2).

26 U.S.C. § 7206(2)

NOTES

1 Section 7206(2) is not limited to returns but can apply to an "affidavit, claim of other document". 26 U.S.C. § 7206(2). In such instances, the instruction should be modified accordingly.

2 The above instruction encompasses a situation when the defendant is *not* the taxpayer, *e.g.*, a return preparer. If the defendant is the taxpayer, then the instruction should be modified by deleting the phrase "of one _____" and by substituting the "defendant" in those portions of the instruction which refer to the "taxpayer."

3 The above instruction is framed in terms of false deductions. If income, or other items, are charged as false, the instruction should be modified, *e.g.*, in which said return it was represented that the said taxpayer had a gross income of \$____; whereas, as the defendant then and there well knew and believed * * *.

GOVERNMENT PROPOSED JURY INST. NO. 183

Statute Defining Offense

Section 7206(2) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * (w)illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under * * * the internal revenue laws, of a return, **1** * * * which is fraudulent or is false as to any material matter * * * shall be guilty (of an offense against the laws of the United States).

26 U.S.C. § 7206(2)

NOTE

1 Section 7206(2) also applies to an "affidavit, claim, or other document" and where appropriate, the instruction should be modified.

GOVERNMENT PROPOSED JURY INST. NO. 184

Elements of Offense

Three essential elements are required to be proved in order to establish the offense charged in the indictment:

First: The act or acts of aiding, or assisting in, or procuring, or counseling, or advising, the preparation, or the presentation, of a false or fraudulent income tax return, **1** as charged;

Second: Doing such act or acts with knowledge that the income tax return in question was false or fraudulent, as charged; and

Third: Doing such act or acts willfully.

A "false" tax return is a return that was untrue when made, and was then known to be untrue by the person making it, or causing it to be made.

A "fraudulent" tax return is a return made or caused to be made with the intent to deceive.

As stated before, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged; the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

26 U.S.C. § 7206(2)

United States v. Perez , 565 F.2d 1227, 1233-34 (2d Cir. 1977)

United States v. Sassak , 881 F.2d 276, 278 (6th Cir. 1989)

United States v. Hooks, 848 F.2d 785, 788-89 (7th Cir. 1988)

United States v. Salerno, 902 F.2d 1429, 1432 (9th Cir. 1990)

United States v. Crum, 529 F.2d 1380, 1382 n.2 (9th Cir. 1976)

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26 U.S.C. § 7206(2)

NOTE

1 Section 7206(2) also applies to an "affidavit, claim, or other document" and where appropriate, the instruction should be modified.

GOVERNMENT PROPOSED JURY INST. NO. 186Knowledge or Consent of Taxpayer

Section 7206(2) of the Internal Revenue Code (26 U.S.C. § 7206(2)) further provides that a person may be guilty of the offense of aiding or assisting in, or procuring the preparation or presentation of a false or fraudulent return, regardless of "whether or not such falsity or fraud is with the knowledge or consent of the (taxpayer) * * *."

26 U.S.C. § 7206(2)

United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984)

Accord United States v. Wolfson, 573 F.2d 216, 225 (5th Cir. 1978)

See also United States v. Dunn, 961 F.2d 648, 651 (7th Cir. 1992); *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987); *United States v. Greger*, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976); *United States v. Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983)

cf. United States v. Hooks, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return, and therefore, violated Section 7206(2), regardless of whether the tax preparer knew of the falsity of fraud).

It is important to note that it may be necessary to instruct the jury on the requirements for accomplice testimony. *Hull v. United States*, 324 F.2d 817, 823 (5th Cir. 1963).

GOVERNMENT PROPOSED JURY INST. NO. 187Signing of Returns
Knowledge of Taxpayer Irrelevant

In making a determination as to whether the defendant aided or assisted in or counseled, advised, or generated or set in motion certain acts or the preparation of documents resulting in the preparation or presentation of fraudulent or false tax returns, the fact that the defendant did not sign and did not prepare the income tax returns in question is not material to your consideration.

Nor is it necessary for the government to prove that any taxpayer whose returns were fraudulent or false had knowledge of the falsity of the returns. In this respect, I instruct you as a matter of law that if you find beyond a reasonable doubt that the defendant knowingly and willfully furnished, prepared, or caused to be prepared, false and fraudulent documents (and offered false advice), which the defendant knew would be relied on in the preparation of income tax returns and would result in [*understated income*] or [*false or overstated deductions*] on the returns named in Counts ____, ____ and ____ of the Indictment, then the government has met its burden of proof under this element of the offense.

26 U.S.C. § 7206(2)

United States v. Nealy, 729 F.2d 961, 963 (4th Cir. 1984).

Accord *United States v. Wolfson*, 573 F.2d 216, 225 (5th Cir. 1978);

See also *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992); *United States v. Motley*, 940 F.2d 1079, 1084 (7th Cir. 1991); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987); *United States v. Greger*, 716 F.2d 1275, 1278 (9th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Crum*, 529 F.2d 1380, 1382 (9th Cir. 1976); *United States v. Kopituk*, 690 F.2d 1289, 1333 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983);

cf. United States v. Hooks, 848 F.2d 785, 791 (7th Cir. 1988) (defendant willfully caused tax preparer to file a false estate tax return, and therefore, violated Section 7206(2), regardless of whether the tax preparer knew of the falsity of fraud).

It is important to note that it may be necessary to instruct the jury on the requirements for accomplice testimony. *Hull v. United States*, 324 F.2d 817, 823 (5th Cir. 1963).

GOVERNMENT PROPOSED JURY INST. NO. 189

Willfulness

To find the defendant guilty of violating Section 7206(2), you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or*

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 192"Willfully" -- To Act or to Omit

In order to sustain its burden of proof for the crime of violating Section 7206(2), as charged in Count[s] _____ of the indictment, the Government must prove beyond a reasonable doubt not only that the defendant committed the acts alleged in the charge[s], but also that the defendant acted willfully.

An act or failure to act is "willful" if it is a voluntary and intentional violation of a known legal duty.

Accidental, inadvertent or negligent, even grossly negligent, conduct does not constitute willful conduct.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

COMMENT

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 See also instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 193

Willfulness

In the context of Section 7206(2), willfulness connotes a voluntary, intentional violation of a known legal duty. Proof of evil motive or bad intent is ***not*** required. This showing of willfulness will most often be made by circumstantial evidence, because direct proof of willfulness may not be readily available.

[At this point, consistent with the evidence in the case, the jury may be given an illustration of the type of evidence from which willfulness may be inferred, as follows:] For example, you may find that the defendant acted willfully from the evidence of the witnesses showing cumulatively a repetitious overstatement of deductions by the defendant.

See *United States v. Brown*, 548 F.2d 1194, 1199 (5th Cir. 1977)

GOVERNMENT PROPOSED JURY INST. NO. 194

Good Faith Belief of Defendant

If a person in good faith believes that an income tax return, as prepared by him [her], truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he [she] cannot be guilty of willfully preparing or presenting, or causing to be prepared or presented, a false or fraudulent return.

United States v. Sassak, 881 F.2d 276, 280 (6th Cir. 1989)

United States v. Kouba, 822 F.2d 768, 771 (8th Cir. 1987)

United States v. Holecek, 739 F.2d 331, 336 (8th Cir. 1984), *cert. denied*, 469 U.S. 1218 (1985)

COMMENT

1 See also instructions on good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.